

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2010-000593-001 DT

03/30/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
K. Waldner
Deputy

STATE OF ARIZONA

STEPHANIE OLOHAN

v.

JERRY CHARLES ELLENBERGER (001)

GEORGE TACKER

GOODYEAR MUNICIPAL COURT
REMAND DESK-LCA-CCC

RECORD APPEAL DISMISSED / REMAND

Lower Court Case Number TR 2008-04219.

Defendant-Appellant Jerry Charles Ellenberger (Defendant) was convicted in Goodyear Municipal Court of driving under the influence. Defendant contends the trial court abused its discretion in denying and dismissing his Petition for Post-Conviction Relief. For the following reasons, this Court denies review and affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On October 5, 2008, Defendant was cited for driving under the influence, A.R.S. §§ 28-1381(A)(1) & (A)(2) and 28-1382(A). This matter proceeded to trial, and the jurors ultimately found Defendant guilty of all three charges. (R.T. of Nov. 23, 2009, at 336-37.) On March 2, 2010, the trial court imposed sentence on Defendant, and on that same date, Defendant filed a timely notice of appeal. On November 8, 2010, this Court issued its Minute Entry affirming the judgment and sentence imposed.

On January 25, 2011, the trial court imposed sentence. On February 25, 2011, Defendant filed a petition for post-conviction relief. The trial court set a hearing for June 6, 2011, and on that date, the trial court denied the petition for post-conviction relief and executed the previously imposed sentence. On July 11, 2011, Defendant's attorney filed a motion for rehearing. On August 2, 2011, after hearing oral argument, the trial court denied Defendant's motion for rehearing. On August 12, 2011, Defendant's attorney filed a Notice of Appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12-124(A).

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II. ISSUES.

A. Has Defendant sought post-conviction relief in a timely manner.

Defendant has asked this Court to review the actions of the trial court in denying his petition for post-conviction relief. To do so, on August 12, 2011, Defendant's attorney filed a Notice of Appeal. The proper means to seek review is to file a Petition for Review. Rule 32.9(c), ARIZ. R. CRIM. P. This Court will therefore treat Defendant's Notice of Appeal as a Petition for Review.

Defendant contends the trial court abused its discretion in dismissing his Petition for Post-Conviction Relief. Under Rule 32.4 of the Arizona Rules of Criminal Procedure, if Defendant wanted to file a petition for post-conviction relief, he was required to do so either 90 days after imposition of judgment and sentence or 30 days after the appellate court issued its order and mandate, whichever was later. In the present case, the trial court imposed judgment and sentence on March 2, 2010, so 90 days from that date would have been May 31, 2010. This Court issued its decision affirming the judgment and sentence and remanding the matter to the trial court on November 8, 2010, which would have been the equivalent of the order and mandate, so 30 days from that date would have been December 8, 2010. Under either of these dates, the February 25, 2011, filing of the petition for post-conviction relief was untimely.

Further, even assuming the February 25, 2011, filing of the petition for post-conviction relief were considered timely, the trial court denied that petition on June 6, 2011. Under Rule 32.9(a) of the Arizona Rules of Criminal Procedure, Defendant had 15 days to file a motion for rehearing, which would have been June 21, 2011, and 30 days to file a petition for review, which would have been July 6, 2011. Defendant filed his motion for rehearing on July 11, 2011, and filed his petition for review on August 12, 2011. Both of these were thus untimely. Because of these failures to comply with the applicable time limits, it appears this Court does not have jurisdiction in this matter, and thus must dismiss this Petition for Review.

B. Did the trial court abuse its discretion in denying Defendant's Petition for Post-Conviction Relief.

Defendant contends the trial court abused its discretion in denying his Petition for Post-Conviction Relief. This Court has reviewed the record in this matter, and concludes the trial court was correct in denying Defendant's Petition for Post-Conviction Relief.

III. CONCLUSION.

This Court concludes it does not have jurisdiction in this matter. This Court further concludes, on the merits, the trial court correctly denied Defendant's Petition for Post-Conviction Relief.

IT IS THEREFORE ORDERED denying and dismissing Defendant's Petition for Review, and affirming the trial court's denial of Defendant's Petition for Post-Conviction Relief.

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IT IS FURTHER ORDERED affirming this Court's November 8, 2010, Minute Entry Order affirming the judgment and sentence of the Goodyear Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Goodyear Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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